No. 14-1055

IN THE

Supreme Court of the United States

CRYSTAL LIGHTFOOT, ET AL.,
Petitioners,

v.

FEDERAL NATIONAL MORTGAGE ASSOCIATION,
Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

SUPPLEMENTAL BRIEF IN OPPOSITION

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ARGUMENT

The Solicitor General's brief in *American National Red Cross v. S.G.*, 505 U.S. 247 (1992), correctly recognized that this Court's decisions since at least 1824 have "established a clear rule that congressional charters provide for original jurisdiction in the federal courts whenever they specifically grant a right to sue and be sued in federal courts." Br. for United States as Amicus Curiae Supporting Pet'rs, *Am. Nat'l Red Cross v. S.G.* (No. 91-594), 1992 U.S. S. Ct. Briefs LEXIS 115, at *5-6. This Court reaffirmed that "basic rule," *Red Cross*, 505 U.S. at 257, and every court of appeals to have considered the question since then has held that Fannie Mae's sue-and-be-sued clause (and other identically worded provisions) grants federal jurisdiction because it authorizes Fannie Mae to "sue and to be sued ... in any court of competent jurisdiction, State *or Federal*," 12 U.S.C. § 1723a(a) (emphasis added). *See* Pet. App. 21a; *Fed. Home Loan Bank of Boston v. Moody's Corp.*, __ F.3d __, 2016 WL 1732656, at *4 (1st Cir. May 2, 2016); *Pirelli Armstrong Tire Corp. Retiree Med. Benefits Trust ex rel. Fed. Nat'l Mortg. Ass'n v. Raines*, 534 F.3d 779, 784 (D.C. Cir. 2008).

The Solicitor General has now abandoned the clear rule he successfully urged this Court to adopt in *Red Cross*. But his brief, if anything, confirms the case *against* certiorari.

1. To start, the Solicitor General admits (U.S. Br. 18-19) that since *Red Cross*, every appellate court to confront the question has held that under "the *Red Cross* rule," a federal charter's "sue and be sued" provision creates federal jurisdiction when it "ex-

pressly refers to the federal courts in a manner similar to the Red Cross statute." *Pirelli*, 534 F.3d at 784; *see* Pet. App. 7a-8a (when "federal charters, like those of the Red Cross and of Fannie Mae, 'expressly authoriz[e] the organization to sue and be sued in federal courts ... the provision extends beyond a mere grant of general corporate capacity to sue, and suffices to confer federal jurisdiction'" (alteration and omission in original)). The First Circuit adopted the same view unanimously, just last month. *See Moody's Corp.*, 2016 WL 1732656, at *4 ("We see no principled reason why *Red Cross*'s rule should not apply in the same way to the Bank's charter as the *Lightfoot* and *Pirelli* majorities found it applied to Fannie Mae's," "and we agree with the Ninth Circuit that the additional phrase, 'of competent jurisdiction,' does not take away that jurisdiction").

Contrary to the Solicitor General's submission (U.S. Br. 17-18), it is irrelevant that some decisions *pre*-dating *Red Cross* had adopted a contrary position. *Red Cross* resolved the dispute involved in those earlier decisions, which is why every court of appeals *since Red Cross* has recognized that the earlier cases were simply incorrect. *E.g.*, Pet. App. 14a. And it is obviously no answer to say that the pre-*Red Cross* conflict remains relevant because *Red Cross* "does not control" here (U.S. Br. 19)—the whole *question* is whether the *Red Cross* rule applies to language like that appearing in Fannie Mae's charter, as all appellate courts thus far have ruled. When at least one appellate court proffers a different answer to that question, this Court can consider whether to intervene and resolve the disagreement. Until then, as always, the lack of circuit-level disa-

greement "weighs strongly against a grant of certiorari." U.S. Br. 19.

Unable to identify a pertinent circuit conflict, the Solicitor General urges review based on disagreement among *district courts*. *Id.* But as the Solicitor General usually recognizes, "this Court does not ordinarily grant review to resolve conflicts among district courts." Br. for U.S. in Opp. to Cert., *Amy v. Monzel* (No. 11-85), 2011 WL 4963245, at *12 n.4 (citing Sup. Ct. R. 10(a)). The courts of appeals are, of course, fully capable of resolving conflicts among the district courts, and they have been doing just that through the recent, uniform decisions cited above. The consistent pattern of circuit decisions will likely suffice to bring district court decisions into line as well. If not, and if sufficient controversy appears likely to persist, the Court can intervene at that time.

The Solicitor General also errs in suggesting (U.S. Br. 19) that district court disagreement is especially relevant here because a remand for lack of jurisdiction is not appealable under 28 U.S.C. § 1447(d). That concern has not prevented three different circuits from exercising jurisdiction and addressing the issue. Many other circuits will have the same opportunity—numerous district courts in other circuits have accepted jurisdiction based on Fannie Mae's charter and denied remand motions, *see* Pet. 18-19, which will permit appellate review of the jurisdictional question after final judgment.

2. The Solicitor General's brief also confirms that this case is not an appropriate vehicle for considering the district court's jurisdiction, because petition-

ers *cannot actually challenge that court's jurisdiction*, no matter how this Court resolves the question presented, as respondent has argued. Opp. 27-29.

The Solicitor General agrees with respondent that this case arises as an appeal from the denial of a Rule 60(b) motion. U.S. Br. 20-21; Opp. 27-29. According to the Solicitor General, that posture explains why respondent *could* have raised a res judicata objection to the exercise of jurisdiction, *viz.*, that subject matter jurisdiction had already been finally (and preclusively) determined by the final judgment being attacked under Rule 60(b). U.S. Br. 20-22. The Solicitor General appears to believe that if respondent had raised res judicata below, certiorari would be futile and therefore unwarranted.

The Solicitor General has it half right. There is indeed a barrier to relief here, but it derives from *Rule 60(b)*, rather than res judicata, as the very authority cited by the Solicitor General makes clear. *See* 18A Charles Alan Wright et al., *Federal Practice & Procedure* § 4428 (2d ed. 2002). As this Court has enunciated the rule, federal courts permit relief from judgment under Rule 60(b) based on an asserted jurisdictional defect "only [in] the exceptional case in which the court that rendered judgment lacked even an 'arguable basis' for jurisdiction." *United Student Aid Funds, Inc. v. Espinosa*, 559 U.S. 260, 271 (2010). There is of course *at least* an "arguable basis" for jurisdiction here, given the decisions of three courts of appeals and numerous district courts. Accordingly, the Solicitor General's acknowledgment of the Rule 60(b) posture of this case supports respondent's argument that an exercise of certiorari jurisdiction here would be an exercise in futility. Opp. 28.

The Solicitor General also offers no answer to the undisputed fact that there is *no* possibility that petitioners could prevail on the merits—they have filed *five* frivolous and essentially identical complaints in state and federal court, and the district court's dismissal of those claims on collateral estoppel and res judicata grounds (Opp. 7-9) was undoubtedly correct. Thus, even if this case were remanded, it would be promptly dismissed by the state court.

It is obviously true that jurisdiction is "a threshold question that must be resolved ... before proceeding to the merits," Pet. Reply 10 (quotation omitted), but that only means that this Court would have to resolve the jurisdictional question raised in the petition *if it granted certiorari*. Neither petitioners nor the Solicitor General can explain why this Court should expend its limited resources on facially meritless cases, i.e., cases where there is no possibility that the answer to the jurisdictional question will affect the ultimate outcome.

3. Finally, the entire premise of the Solicitor General's case for review is wrong—there is no error in the D.C., Ninth, and now First Circuit decisions that the *Red Cross* rule resolves the question here.

a. In *Red Cross*, this Court recognized "the basic rule" that "a congressional charter's 'sue and be sued' provision may be read to confer federal court jurisdiction if, but only if, it *specifically mentions the federal courts*." *Red Cross*, 505 U.S. at 255 (emphasis added). Under this clear and administrable rule, when a federal charter explicitly authorizes the chartered entity "to sue and be sued in federal courts," the provision "extends beyond a mere grant

of general corporate capacity to sue" and "suffices to confer federal jurisdiction." *Id.* at 257. That rule resolves this case, because Fannie Mae's charter authorizes it "to sue and be sued in federal courts." *Id.*

b. The Solicitor General rejects the application of that clear rule here because of the language in Fannie Mae's sue-and-be-sued clause allowing suit in "*any court of competent jurisdiction*, State or Federal." According to the Solicitor General, the underscored phrase "suggests that the charter does not provide an independent basis for federal (or state) jurisdiction." U.S. Br. 11.

The Solicitor General is incorrect. As an initial matter, his reading conflicts with this Court's construction of a substantively identical Fair Labor Standards Act ("FLSA") provision, which states that an FLSA suit "may be maintained ... in any Federal or State *court of competent jurisdiction*." 29 U.S.C. § 216(b) (emphasis added). In *Breuer v. Jim's Concrete of Brevard, Inc.*, 538 U.S. 691 (2003), this Court held that the provision itself establishes federal jurisdiction over the suit, *id.* at 694, with no suggestion that the phrase "court of competent jurisdiction" requires an independent basis for subject matter jurisdiction.[1]

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[1] Although an action under the FLSA *also* would implicate federal question jurisdiction under 28 U.S.C. § 1331, the Court in *Breuer* held that § 216(b) *itself* sufficed to establish jurisdiction, and that § 1331 merely provided a separate, *alternative* jurisdictional basis for suit. 538 U.S. at 694 (after observing that § 216(b) itself created jurisdiction, adding that "the district courts would *in any event* have original jurisdiction over FLSA claims under 28 U.S.C. § 1331" (emphasis added)).

The Solicitor General's position also ignores *Red Cross*—including the government's brief submitted in that case—and the 150 year history on which this Court relied establishing that what matters is whether the corporation's charter specifically allows it to sue and be sued *in federal courts*, which Fannie Mae's charter undoubtedly does. Congress could of course alter that rule (or Fannie Mae's charter) at any time, yet it has done neither since 1954, when the Fannie Mae sue-and-be-sued clause took its present form.

c. Finally, the Solicitor General misreads the history of Fannie Mae's charter, which confirms the *Red Cross* rule. The Solicitor General does not and could not deny that before 1954, Fannie Mae's sue-and-be-sued clause *did* independently create federal jurisdiction, because it allowed suit "in any court of *law or equity*, State or Federal." U.S. Br. 15 (quotation omitted; emphasis added). The only question is whether Congress, by amending this provision in 1954 to replace the italicized language with the words "in any court of competent jurisdiction," intended to silently alter the sue-and-be-sued clause's jurisdictional character. That inference is not plausible, for several reasons.

First, contemporaneous appellate caselaw had interpreted materially identical language as conferring subject matter jurisdiction. *See, e.g.*, *Ferguson v. Union Nat. Bank of Clarksburg, W. Va.*, 126 F.2d 753, 756 (4th Cir. 1942) ("no question but that the court had jurisdiction" under provision allowing administrator to "sue and be sued in any court of competent jurisdiction, State or Federal" (quotation omitted)); *George H. Evans & Co. v. United States*,

169 F.2d 500, 502 (3d Cir. 1948) (same). Congress would not have employed the same language to have the exact opposite effect.

Second, since *Osborn v. Bank of the United States*, 22 U.S. (9 Wheat.) 738 (1824), this Court itself has "placed Congress on prospective notice of the language necessary and sufficient to confer jurisdiction," *Red Cross*, 505 U.S. at 252—i.e., Congress must say that the entity is authorized to sue *in federal court*. Congress accordingly would have known that, to alter the jurisdiction-conferring power of Fannie Mae's charter, it needed only to eliminate the reference to "Federal" court. Indeed, the Solicitor General does not mention it, but Congress *did exactly that in the same Act that amended Fannie Mae's charter*—Congress deleted the word "Federal" from the "sue-and-be-sued" provision of the Federal Savings and Loan Insurance Corporation ("FSLIC") statute. Pub. L. No. 83-560, § 501(1), 68 Stat. 590, 633 (1954) (amending Pub. L. No. 73-479, § 402(c)(4), 48 Stat. 1246, 1256 (1934)). "The fact that Congress chose to keep that all-important word in the Fannie Mae statute but to delete it from the FSLIC statute is compelling evidence that Fannie Mae's 'sue-and-be-sued' provision was meant to ensure continuing federal jurisdiction in Fannie Mae cases." *Pirelli*, 534 F.3d at 787.

Third, there is a sound practical explanation for *why* Congress replaced "court of law and equity" with "court of competent jurisdiction"—it "served the purpose of eliminating an anachronistic reference to courts of law and equity," just as "Congress had recently done in other statutes." Pet. App. 10a, 12a. As shown above, Congress would not reasonably

have believed that adding the phrase "court of competent" would have eliminated subject matter jurisdiction, given recent appellate authority. *See supra* at 7-8. To the contrary, given this Court's own then-recent precedent, Congress surely would have understood the phrase "court of competent jurisdiction" as confirming the requirement of *personal* jurisdiction. Just two years before the 1954 amendment, this Court interpreted the term "court of 'competent jurisdiction'" in a federal entity's corporate charter as assuring that suit could only be brought against the entity where there was *personal* jurisdiction, i.e., "that review must be in that district where the [defendant] can be served." *Blackmar v. Guerre*, 342 U.S. 512, 516 (1952). Congress obviously had that simple but important principle rule in mind in using the same phrase in the 1954 amendment—not a sub silentio intent to eliminate the jurisdictional effect of Fannie Mae's sue-and-be-sued clause.

Fourth, the Solicitor General expressly admits (U.S. Br. 16) that the amendment did *not* actually have any jurisdictional effect in 1954, because Fannie Mae was at the time still majority-owned by the government, and thus 28 U.S.C. § 1349 would have independently created federal jurisdiction over suits by and against Fannie Mae. According to the Solicitor General, the jurisdiction-stripping effect of the 1954 amendment would spring into action only in the hypothetical, future event that Fannie Mae became fully private. U.S. Br. 16-17. "When Congress acts to amend a statute," however, "it intends its amendment to have real and substantial effect." *Stone v. INS*, 514 U.S. 386, 397 (1995). Under respondent's reading of the 1954 amendment—unlike

the Solicitor General's reading—the amendment *did* have full and immediate effect: Congress jettisoned anachronistic "law and equity" language and assured that Fannie Mae's charter did not deviate from normal rules of personal jurisdiction and venue. And again, this non-jurisdictional reading is consistent with the "basic rule" of *Red Cross*, whereas the Solicitor General's reading flouts that rule.

Fifth, the Solicitor General, like the dissent below, relies on a *later* 1974 amendment to a *different* Fannie Mae-related provision, which provided that Fannie Mae "shall be deemed, for purposes of jurisdiction and venue in civil actions, to be a District of Columbia corporation." U.S. Br. 13 (quoting 12 U.S.C. § 1717(a)(2)(B)). The Solicitor General contends that this provision was meant to establish Fannie Mae as a D.C. *citizen*, as required to give Fannie Mae access to federal courts under the diversity-of-citizenship statute. *See* 28 U.S.C. § 1332(a) (defining diversity jurisdiction in terms of citizenship).

As the court of appeals majority explained, however, the "legislative history strongly suggests that the amendment was intended to allow Fannie Mae to move its principal place of business to the suburbs without effecting any change to the place where it would be subject to general jurisdiction." Pet. App. 20a (citing and quoting history). The Solicitor General does not answer or even respond to this argument. And the Solicitor General offers no reason to conclude that the 1974 amendment was meant to establish Fannie Mae as a D.C. *citizen* for diversity purposes, rather than simply establish D.C. as its

corporate home for personal jurisdiction and venue purposes.

Indeed, when Congress means to deem a federally chartered corporation to be a "citizen" of a particular state (or D.C.) for diversity purposes, it says so explicitly. 7 U.S.C. § 941(c) ("The telephone bank ... shall, for the purposes of jurisdiction and venue, be deemed a *citizen* and resident of the District of Columbia." (emphasis added)); 28 U.S.C. § 1348 ("All national banking associations shall, for the purposes of all other actions by or against them, be deemed *citizens* of the States in which they are respectively located." (emphasis added)). Congress's decision to avoid the "citizenship" language that most likely would implicate diversity of *citizenship* indicates that Congress was seeking to serve objectives other than ensuring federal jurisdiction—after all, Fannie Mae's sue-and-be-sued clause *already* ensured federal jurisdiction under the longstanding *Red Cross* rule.

Sixth, and finally, the Solicitor General cannot explain why Congress would want to provide Fannie Mae with *less* access to federal courts than Freddie Mac, which may "sue and be sued, complain and defend, in any State, Federal, or other court." 12 U.S.C. § 1452(c)(7). On the Solicitor General's theory, the absence of the "of competent jurisdiction" phrase establishes federal jurisdiction for suits by and against Freddie Mac under *Red Cross*, whereas the presence of the phrase in Fannie Mae's otherwise-comparable provision strips the provision of any jurisdictional effect whatsoever. But it is difficult to see why Congress would have wanted Fannie Mae treated so differently. From its outset through to-

day, Fannie Mae has played a central role in federal housing policy. Opp. 2-5. There is no sound policy reason Congress would have thought Fannie Mae should have less access to federal courts in performing that role than Freddie Mac, and hence no sound reason to reject the straightforward reading of the "of competent jurisdiction" phrase adopted by every appellate court to have considered it.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted,

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June 2016